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DATE: Monday, October 13, 2003 FAXED ON: Monday, October 13, 2003 11:35:06 A

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COMPANY Office of Foreign Assets Control
FAX NO. 622-1657
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COMMENTS

Re: Revised Civil Penalties Hearing Regulations--Request for
Comments (68 Fed. Reg. 53640, 53662)

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THANK YOU.
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ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER

1400 L Street, N.W., Washington, D.C. 20005 Suite 800 (202) 371-5994

October 13, 2003

VIA FACSIMILE (622-1657) AND FIRST CLASS MAIL

Chief of Records
ATTENTION: Request for Comments
Office of Foreign Assets Control
1500 Pennsylvania Avenue, NW
Washington DC 20220

**Re: Revised Civil Penalties Hearing Regulations—Request for
Comments (68 Fed. Reg. 53640, 53662)**

Dear Sir or Madam:

This responds to OFAC's request for comment on the revised Civil Penalties Hearing Regulations ("Rule") that were published in the September 11, 2003 Federal Register, both as an interim final rule, 68 Fed. Reg. 53640, and as a proposed rule, *id.* at 53662. To begin with, the Industry Coalition on Technology Transfer ("ICOTT") commends OFAC for seeking comment on the revision. We are constrained to add, though, that we do not perceive the existence of any emergency justifying publishing the Rule in interim final form rather than solely as a proposed measure.

On the whole, the Rule restates existing regulation and practice. We offer several specific comments:

1. Section 501.711 requires that a respondent desiring a hearing file its request therefor within thirty days after service of the penalty notice, and section 501.712 provides that the Director of OFAC will acknowledge such a request within sixty days. If an Order Instituting Proceedings thereafter is issued by OFAC, the respondent is required by section 501.714(a) to file its answer within forty-five days, and section 501.722(d) envisages an initial prehearing conference within fourteen days after service of the answer.

Unfortunately, the Rule does not set any time limit for the period between the receipt of a respondent's request for a hearing and the decision whether to issue an Order Instituting Proceedings, nor does it establish a time limit for the period between the filing of the answer and the commencement of the hearing. These omissions are regrettable because it is our understanding that in practice, these two time periods can extend for months and even years. This is inappropriate as a policy matter and also may raise issues of constitutional due process.

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2. Section 501.720 permits agency counsel to assist the administrative law judge ("ALJ") in any proceeding other than one in which the same attorney is performing an investigatory or prosecutorial role (or one "that is factually related"). This means that a given agency attorney can *simultaneously* be assisting the ALJ in respect of one proceeding while prosecuting another proceeding before the same ALJ. As a matter of fairness and appearance thereof, it would be preferable to have fixed (though not necessarily permanent) assignments of agency counsel to one or the other role, rather than making assignments on a matter by matter basis. At a minimum, an agency attorney should not be assisting or advising the ALJ about one case while that attorney is involved as prosecutor or investigator in another case before the same ALJ as to which an Order Instituting Proceedings has been issued.

3. We commend the Rule for its provisions prohibiting the withholding of documents containing material exculpatory evidence (§ 501.724(b)) and requiring the parties to provide a privilege log for withheld documents (§ 501.724(c)).

4. Section 501.734(a)(5) allows the ALJ to permit introduction of a prior sworn witness statement if, "[i]n the discretion of the [ALJ], it would be desirable, in the interests of justice, to allow the . . . statement to be used." Given that there can be no cross examination of such a witness, such an open ended, standard-free provision raises substantial questions of fairness and due process from the standpoint of respondents. The provision should be omitted from the final version of the Rule.

The Industry Coalition on Technology Transfer (ICOTT) is a nonprofit group of major trade associations (names listed below) whose thousands of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise U.S. Government officials of industry concerns about export controls, and to inform ICOTT's member trade associations (and in turn their member firms) about the U.S. Government's export control and embargo activities.

Sincerely yours,



Eric L. Hirschhorn

ICOTT Member Trade Associations

American Association of Exporters and Importers
Electronic Industries Alliance
Semiconductor Equipment and Materials International
Semiconductor Industry Association